IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1043 of 1995

with

CRIMINAL APPEALS No 1044 AND 1045 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAVINBHAI @ BAKABHAI BHIKHABHAI

Versus

STATE OF GUJARAT

Appearance:

MR KR RAVAL for the appellants

MR KT DAVE, APP, for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 12/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

1. The appellants of these appeals were tried by the Special Judge, Panchmahals at Godhra, in Special Case No.93 of 1994, for offences punishable under Sections 376, 452, 323 and 324 read with Section 114 of Indian Penal Code and for an offence punishable under Section 3(2)(5)(ii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Atrocities Act") and on appreciation of evidence, by judgment and order dated the 11th October, 1995, the learned Special Judge convicted all the appellants for the offence punishable under Section 376 and sentenced them to undergo rigorous imprisonment for a period of ten years and a fine of Rs.1000/- and, in default of payment of fine, to undergo further six months rigorous imprisonment. No separate sentence was imposed for other offences, though they were held guilty. It is against this judgment that the original three accused have preferred these appeals and, therefore, all the appeals are disposed of by this common judgment.

2. A First Information Report was lodged by Rukhiben, the victim, before Halol Police Station, which was registered as C.R. No.195 of 1994 on the 18th August, 1994. Reading the F.I.R., it reveals that on 17.8.1994, an incident took place at about 10.00 P.M. It is stated by the informant that, she was residing with her husband. After having supper, both of them were sleeping and at about 10.00 P.M., the appellants, who were under the influence of alcohol, came there. They invited both of them to visit Halol for a movie. However, husband of Rukhiben refused to accompany. The appellants, thereupon, started beating Vithalbhai, husband of victim. On intervention for assistance, original accused No.1 entered the house and came out with a sickle and caused an injury on right hand palm of the informant, as a result of which there was bleeding injury. Accused No.3 delivered a stick blow on left hand. It is stated by her in the F.I.R. that her husband got rescued himself and ran away from the house. Thereafter, all the three accused caught hold of the person of Rukhiben by stating that she was to be raped, as a result of which she raised a cry. Thereupon, all the three left the place. None arrived to assist her. She woke up early in the morning to inquire about her husband. On the way, one Pravinbhai Babarbhai Rabari met her to whom she informed about the incident. Thereafter, she went to village Timbi and approached social worker Jashwantbhai. On being informed about the incident and

on seeing the injuries on the person of Rukhiben, as stated in the F.I.R., said Jashwantbhai took her to Halol Police Station for lodging the F.I.R. The information was lodged on 18.8.1994 at about 1.45 P.M. Police commenced investigation and filed charge sheet against the accused persons for the aforesaid offences for which they were tried. The learned Special Judge, on being satisfied about the papers being supplied, framed charge vide Ex.4 on 1.6.1995, to which the accused pleaded not guilty. On appreciation of evidence led by the prosecution and hearing the submissions made by the counsel for the State as well as the accused, the Trial Court convicted the accused-appellants for the aforesaid offences against which the present appeals are preferred.

3. Mr. Raval, learned advocate appearing for the appellants submitted that, in the instant case, there is no evidence to connect the accused with the crime for any offence punishable under the Atrocities Act. According to his submission, the prosecution has led no evidence to show that the victim belongs to either Scheduled Castes or Scheduled Tribes. He submitted that from the record it appears that the accused are of the same community and, in fact, the Trial Court has not convicted accused No.3 for the offence punishable under the Atrocities Act. According to his submission, in absence of any evidence led by the prosecution either oral or documentary to establish that the victim belonged to either Scheduled Castes or Scheduled Tribes and that the accused persons do not belong to the Scheduled Castes or Scheduled Tribes, the case of the prosecution must fail on this count so far as offence punishable under the Atrocities Act is concerned. He submitted that the learned Public Prosecutor could not show any evidence pointing out that the victim is a member of either the Scheduled Castes or the Scheduled Tribes or that the accused are neither members of Scheduled Castes nor Scheduled Tribes. Therefore, the charge on this count must fail and the accused must be acquitted.

3.1 Learned advocate appearing for the appellants submitted that, in the instant case, if the evidence is read, it becomes clear that the prosecution has come with doubtful version. Mr. Raval drew the attention of the Court to the evidence of P.W.5-Jaswantbhai Parsingbhai (Ex.26), who stated before the Trial Court that, at about 2.00 P.M. Rukhiben as well as her husband came. Rukhiben told that she was raped and the persons were from Radhanpur. She further stated that one was Bako and the other was Bharat. She did not remember who was the third person. As it was midnight, the said

witness-Jashwantbhai stated that the next day morning, they would go to the Police Station. The witness has come out with the version that, first application in writing was given wherein he mentioned about the rape. At about 1.00 P.M. information was recorded by Abhesing. He has stated that the F.I.R. was not recorded as stated by the informant. It is required to be noted that this witness was a member of a Nagarpalika since about 3 to 4 years. He was working as a social worker. He had several occasions to visit the Police Station. He has stated that he is taking leading part in the community. He has further deposed that with regard to the work of Panchayat or Police Station, he used to accompany persons. He has come out with the version that Rukhiben and her husband both came while in the F.I.R., if perused, it is clear that her husband left the house and did not meet Rukhiben. Story about the rape even was not disclosed. A social worker, realising that a person has sustained injuries, would ordinarily take the person to a Medical Officer immediately. The incident took place hardly at a distance of 2 kms from the Police Station which is clear from the F.I.R. (Ex.14). If Rukhiben could travel a distance of 2 kms. to reach the house of Jashwantbhai, it is difficult to understand as to why she could not travel 2 kms immediately for taking medical aid. It is also difficult; to believe the version put forward by Jashwantbhai that the Police asked him to wait till 1.00 P.M. The Police Officer has stated that the informant arrived at about 1.30 P.M. and her complaint was recorded. There is nothing to show that why the Police Officer, who is not concerned either with the witnesses or the accused would refuse to record a complaint and that too of a social worker, who is a member of Nagarpalika and is visiting Police Station frequently. In view of this, it is difficult to place reliance on the evidence of this witness.

4. So far as Rukhiben is concerned, she is examined at Ex.13. She has narrated the manner in which the incident took place. she has identified accused No.1-Pravinbhai @ Bakabhai Vithalbhai Baria. In her evidence, except accused accused No.1, she has not identified other two accused persons before the Court. This has relevance, as at the earlier point of time, she was not in a position to disclose name of the third accused. In her evidence, she has stated that only two accused persons committed rape. When the third was about to approach her, she raised shouts, as a result of which all the three left. While before Jashwantbhai, she had stated about all the three accused persons. All the three are convicted for having committed rape. Before

the Court, she has come out with the version that she was alone and was weeping. There is a question as to where she remained after departure of accused till she met Jashwantbhai. House of Jashwantbhai is not far away. She has stated that her husband came out of the pond and both of them approached Jashwantbhai (P.W.5). This is an improvement in her story. Before police story was different. In the evidence, she has not come out with the version that they reached the Police Station in the early morning, but she has stated that the Police asked them to wait for some time and, thereafter, at about 1.30 P.M. the complaint was recorded. When she reached police station is not stated by her. She has further stated that the Writer-Constable administered threats and stated that they should not state the things which she was stating and only with regard to injuries, she should have stated and, according to her, therefore, she stated that she was beaten and she put her thumb impression on the F.I.R. Would a Social Worker, an elected member and a person frequently visiting Police Station allow the constable to act in the way alleged by the witness?

5. Keeping this aspect in mind, out attention was drawn to the evidence of Medical Officer-Dr. Subodhbhai S. Mishra (P.W.4). From the evidence of the doctor, it transpires that on 18.8.1984, Rukhiben was examined at 4.45 P.M., but she did not narrate any history. On examination, following injuries were found :-

(1) Multiple superficial abrasions on both knees, left scapular region, left breast, left shoulder and adjoining left arm.

(2) Bite mark over upper part of left arm.

(3) CLW 1 1/2 x 1 cm size and 1 1/2 x 1 1/12 cm size over right hand with swelling over right hand.

On 18.8.1994, no complaint was made before him about the rape having been committed by any of the accused persons. The Medical Officer referred the patient to Civil Hospital, Godhra, for orthopaedic examination in view of the injuries. The certificate issued by the Medical Officer is produced on record at Ex.20. It appears that on 19th August, 1994, again she was produced before the said Medical Officer and the Medical Officer referred to Civil Hospital, Godhra, for examination by gynaecologist, so that the possibility of alleged rape could be found out. The certificate is produced at Ex.25.

5.1 Learned advocate for the appellants submitted

that before Dr. Maksud, she has come out with the version that she was assaulted with Dharia, whereas earlier version was that she was assaulted with sickle.

5.2 It seems that, after the Senior Officer took over investigation, Rukhiben was referred again for examination. Dr. Maksud (P.W.) examined her on 19.8.1994. He has found following injuries :-

"(1) A black bruise on left upper arm and shoulder region size 10 cms x 6 cms.

(2) I.W. on the dorsum of Rt. hand, near base of ring finger - size 1 cm x 1/4 cm x skin deep.

(3) D.T.S. on dorsum of Rt. hand.

(4) Two abrasions on the upper part of left brest - size 5 cms x 1/2 cm.

(5) Abrasion on left knee - patellar region - size 1 cm. x 1 cm.

(6) Abrasion on Rt. knee size 1/2 cm. x 1/2 cm.

No other external injuries found on valva and vagina.

Gynaecologist Dr. J.M. Shah examined her and samples were collected by him and samples were handed over to police on 20.8.94 for forensic examination.

Age of victim was above the 18 years according to Ragiologist opinion."

5.3 It is not clear from the evidence of this witness that she was examined for finding out whether any sexual offence was committed or not, but it seems that for the said purpose, Rukhiben was referred to Dr. J.M. Shah, who is examined as P.W.9 at Ex.35. Dr. J.S. shah, who examined Rukhiben on 19.8.1994, has stated that the said witness had stated before him that she had a child who expired when it was of three years' old. He further stated that, on her stomach, there was sign of operation indicating that she was operated for family planning. On examination of her private parts, no injury of whatsoever nature was noticed. There was neither outside injury nor inside of the private part. Medical Officer in his report has noted that "there is no evidence of any injury over perineum or vluva, vagina or mens pubis". It is further stated in the report that "no evidence of any

injury over vaginal wall or forchetle vagina, patulous". The samples were taken from the private parts, namely, pubic hair, vaginal swab, saliva, etc. and were forwarded to the Forensic Science Laboratory. He has stated that the laboratory examination found no spermatozoa, which he has noted in the case papers.

6. The learned Additional Public Prosecutor could not point out anything on record that there was sufficient evidence of rape on person of Rukhiben. In the instant case, the version is changed from time to time and, therefore, no reliance can be placed on the evidence of the complainant. In the cross-examination, Rukhiben has stated that she got married before 5-6 years with Vithalbhai, who was her third husband. She has stated that she was prosecuted in past for causing death of her husband, but she was not able to state as to when she was prosecuted. She has stated that Jashwantbhai (P.W.5) belongs to their community and she further stated that, while on foot, it would take about 5 minutes to reach the house of the said Jashwantbhai. The building of the Panchayat is about 3 minutes distance. There are other houses of community members near the Panchayat. She has denied the suggestion that it was a raining night. From this evidence, learned advocate for the accused submitted that the house of Jashwantbhai was so near that she could have reached immediately. Even her husband, instead of hiding himself in a pond, could have approached Jashwantbhai for assistance. The story put forward that the accused had come and assaulted is not probable, according to him. He further submitted that, if the incident took place at about 11.00 P.M., then it would not have taken much time to reach the house of Jashwantbhai. Ordinarily, when there was none, according to the witness, then she would have ordinarily rushed to the house of Jashwantbhai or she would have immediately asked for assistance from caste fellows, who were residing in the vicinity.

7. She has denied the suggestion that she is in the habit of taking liquor and she was prosecuted in the past. She has admitted in the evidence that she was prosecuted for taking toddy, a prohibited country liquor. She has denied the suggestion that because of her habit of taking liquor, there were frequent quarrels between husband and wife. She has denied the suggestion that her husband, after beating her, left the house. She has denied the suggestion that, on the day of incident, her husband assaulted her with a sickle and she went to Jashwantbhai to convey the same. She has stated in her evidence that she was told by the persons of Social

Welfare Department that if she would not give the evidence as tutored, then a sum of Rs.10,000/- will be recovered from her. In the evidence, it is further stated that Lili is her sister. She has launched prosecution against one Anop Rayji and Laxman Nayak for attempting to commit rape and the case is pending. She denied that she had stated before the police that, early in the morning, she had woken up and went in search of her husband and on the way she met one Pravinbhai Babarbhai, to whom she narrated the incident. It requires to be noted that Pravinbhai Babarbhai Rabari was not examined. No explanation is tendered by the prosecution in this regard. The witness has stated that, she had narrated the incident to Pravinbhai Babarbhai and he was the first person who was informed about the incident. Therefore, it was necessary for the prosecution to have examined this witness.

8. P.W.3-Vithalbhai, husband of Rukhiben, is examined, who has stated that accused arrived at his house and invited for a picture, but he stated that he was tired and he wanted to sleep. It is thereupon that all the three accused started beating him, as a result of which he ran away. It is required to be noted that the accused did not come with any weapon. It is also difficult to believe that at 11.00 P.M., they would invite to go for a movie. There is evidence of P.W.14-Bhalabhai Shanabhai (Ex.44), Police Constable, to the effect that there was rain during night hours. the scene of offence Panchnama (Ex,.28) also refers to the same aspect. Thus, it is difficult to believe that person would come to invite to go for a movie at 11.00 P.M. when it was raining in the night. It is also required to be noted that, after 12.00 midnight, theatres are not open. Therefor, this story is highly doubtful.

9. No doubt, on the person of Rukhiben, there were injuries, but the fact that the husband left the place and did not turn up to see as to what has happened raises a doubt about the manner in which the incident took place, as alleged by the prosecution. It is admitted by Rukhiben that, on some occasions, there used to be quarrel between them. The defence has suggested that husband might have beaten and might have run away. We do not give importance to this suggestion, but one thing is certain that the young boys aged 18, 20 and 21 were tried for serious offences. It is required to be noted that the age indicated in the charge is as on the date on which the charge was framed, but as on the date of incident, the age would be less than what is indicated. No enmity is suggested against the accused persons.

There was no reason for the accused to have behaved in the manner in which it is alleged. If it is taken that they were known to each other very closely as they invited the complainant and her husband for a movie, even then, it is difficult to accept that merely on refusal, the accused would start beating husband of the victim. It appears that the manner in which the incident has happened has not been stated before the Court.

10. The accused are undergoing sentence since from the date of their arrest, i.e. from the 21st August, 1994. We requested the learned Additional Public Prosecutor to point out as to whether the evidence is worth pointing out that the accused appellants arrived at the house of the victim under the influence of alcohol, as observed by the Trial Court. After going through the evidence, the learned Additional Public Prosecutor fairly conceded that there is not a wisper either in the evidence of Rukhiben or Vithalbhai, husband of Rukhiben, that the accused appellants were under the influence of alcohol when they invited them for a movie. In our opinion, it is difficult to agree with the views expressed by the Trial Court. We are of the opinion that the prosecution story is not beyond the shadow of doubt and, therefore, the accused must be given the benefit of doubt by allowing this appeal.

11. In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated the 11th October, 1995, passed by the learned Special Judge, Panchmahals, at Godhra, in Special Case No.93 of 1994 is hereby set aside. The appellants are acquitted of the offences with which they were charged. The appellants are ordered to be set at liberty forthwith, if not required in any other case.

[B.C. PATEL, J.]

[A.L. DAVE, J.]

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